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No. 94-689

In The

Supreme Court of the United States

October Term, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,

Petitioners,

v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF ROCKY MOUNTAIN OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF ROCKY MOUNTAIN OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Rocky Mountain Oil & Gas Association ("**RMOGA**"), pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, submits this Motion

for Leave to File Brief Amicus Curiae requesting the Court to allow RMOGA to file its Brief of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of the Petitioners Duncan Energy Company, NBB Oil & Gas Partners (U.S.A.), Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc. on October 17, 1994.

RMOGA is a voluntary, non-profit trade organization designed to promote the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in eight states within the Rocky Mountain region, including the state of North Dakota. RMOGA's members own, lease, or operate significant oil and gas properties in, on, and surrounding many major Indian reservations within those states. Indeed, RMOGA members account for more than 90% of the oil and gas activities within its constituent states, including, but not limited to, activities on the Navajo, Uintah and Ouray, Southern Ute, Blackfeet, Crow, Rocky Boy's, Flathead, Fort Belknap, Fort Peck, Wind River, and Fort Berthold Reservations. Because the activities of RMOGA members constitute the major portion of oil and gas operations on the reservations, including operations on federal, state, and private enclaves within the exterior boundaries of those reservations, RMOGA is directly affected by the Eighth Circuit's decision. RMOGA can provide the Court with a macro-view of the effect of the decision below on oil and gas operations in the Rocky Mountain region, the frustrations arising from conflicting circuit decisions, and other relevant economic and demographic information bearing on the issue of attempted tribal regulation of public and private enclaves within their reservations that

has not already been brought to the Court's attention by the parties. For this reason, RMOGA respectfully requests this Court to grant its Motion for Leave to File Brief Amicus Curiae and to consider the Brief of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of the Petitioners.

Counsel for RMOGA has obtained a letter of consent from counsel for the Petitioners. A copy of the consent letter is submitted herewith under separate cover. Counsel for RMOGA requested consent from counsel for the Respondents. Respondents denied RMOGA's request.

Respectfully Submitted,

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November 28, 1994

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus Curiae the Rocky Mountain Oil & Gas Association ("**RMOGA**"), pursuant to Rule 37 of the Rules of the Supreme Court of the United States, submits this Brief

of Amicus Curiae in Support of Petition for Writ of Certiorari filed on behalf of Petitioners Duncan Energy Company, NBB Oil & Gas Partners, Amerada Hess Corporation, Tyrex Oil Company and Turtle Mountain Gas & Oil, Inc. on October 17, 1994, and respectfully requests, pursuant to 28 U.S.C. § 2101(c), that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the Order entered by the Eighth Circuit on June 8, 1994, as confirmed by denial of rehearing en banc July 19, 1994.

INTEREST OF AMICUS CURIAE

RMOGA is an industry trade organization whose members own, lease, or operate oil and gas properties in the Rocky Mountain region. It is a voluntary, non-profit association designed to promote the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in the states of Colorado, Idaho, Montana, Nebraska, North and South Dakota, Utah and Wyoming and to foster the best interests of the public and the industry.

RMOGA members constitute major, as well as independent, oil companies. They account for 90% of the oil and gas activity in the eight constituent states, including activity in, on, and surrounding the numerous Indian reservations in these states. The reservations include the most geographically expansive Indian reservations in the

continental United States,[1] as well as the majority of reservations of energy producing tribes.[2] Many of their oil and gas properties comprise enclaves of federal, state, or private ("fee") lands owned by non-Indians within the

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[1] Acreage in tribal and allotted reservation lands within RMOGA's constituent states equals 7,920,812 acres as of 1977. *See* PETER C. MAXFIELD, ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS App. C, at 321-35 (1977) (hereinafter MAXFIELD). Recent decisions of the federal judiciary have expanded the acreage total to exceed 10,000,000 acres. *See, e.g., Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (expanding the Uintah & Ouray Reservation by 3,000,000 acres), and *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, *reh'g denied*, ___ U.S. ___, 114 S.Ct. 1580 (1994) (diminishing the expanded Uintah & Ouray Reservation by approximately 1,000,000 acres).

[2] Reservations within the constituent RMOGA states (and tribes if different from reservation names) include the following: **Colorado** – Southern Ute, Ute Mountain Ute; **Idaho** – Fort Hall (Shoshone – Bannock), Coeur D'Alene (Coeur d'Alene – Kootenai – Pend d'Oreille – Spokane), Kalispel, Kootenai, Lapwai (Nez Perce); **Montana** – Blackfeet (Blackfeet – Blood – Piegan), Crow, Flathead (Flathead – Kootenai – Kalispel – Pend d'Oreille – Bitter Root – Carlos Band), Fort Belknap (Assiniboin – Gros Ventre), Rocky Boy's (Chippewa Cree), Fort Peck (Assiniboin – Sioux), Tongue River (Northern Cheyenne); **Nebraska** – Omaha, Ponca, Santee-Sioux, Winnebago; **North Dakota** – Fort Berthold (Arikara – Hidatsa – Mandan: The Three Affiliated Tribes), Fort Totten (Sioux), Standing Rock (Sioux), Turtle Mountain (Chippewa); **South Dakota** – Cheyenne River (Sioux), Crow Creek (Sioux), Flandreau-Santee Sioux, Lower Brule Sioux, Pine Ridge (Ogalala Sioux), Rosebud (Sioux), Yankton (Sioux), Sisseton-Wahpeton (Sioux), Standing Rock (Sioux); **Utah** – Navajo, Uintah & Ouray (Northern Ute); and **Wyoming** – Wind River (Shoshone – Arapaho). *See* MAXFIELD, *supra* note 1, at Apps. B & D, pages 306-20, 337-59.

exterior boundaries of Indian reservations, including the Fort Berthold Reservation.

RMOGA has a substantial interest in the outcome of this case for six primary reasons. First, its members have become increasingly subject to attempts by Indian tribes to regulate oil and gas operations on fee and public lands within reservation boundaries. In view of these continuing attempts, access to federal court for injunctive and declaratory relief is imperative. The Eighth Circuit's holding in this case prohibits any consideration by a federal court of the appropriateness of tribal regulation and governance until the tribal court has ruled on the scope of tribal jurisdiction. The Eighth Circuit's holding makes the exhaustion (abstention) doctrine absolute, regardless of whether a federal question is involved or the lands regulated are tribal, public or private. It, in effect, establishes a double standard for access. It forecloses federal court relief in the first instance to non-Indians, but leaves unfettered the right of Indian tribes to choose between the federal and tribal forums.

Second, absolute application of the exhaustion doctrine will have a chilling effect on the exploration for, and the development and production of, natural resources vital to the economy and national defense of the United States. The rising costs of oil and gas exploration, development, and production simply will not sustain the added expense of multi-jurisdiction regulation of the same oil and gas operations and lands.[3] It is one thing for

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[3] On some reservations, such as the Navajo and Uintah & Ouray in Utah, federal, Indian, and state agencies assert

tribal governments to choose as a matter of principle, philosophy, or agenda to temporarily or permanently forego energy development of their own lands and to postpone the enhancement of tribal treasuries by the attendant revenue stream comprising mineral royalty and tribal severance, use, and business activities tax dollars. However, it is quite another to interfere by way of regulation and asserted jurisdiction with private and public

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concurrent operational jurisdiction over oil and gas exploration, development, and production. *See, e.g.*, Pub. L. No. 85-868, 72 Stat. 1686 (1958) & Pub. Land Order 3397, 29 *Fed. Reg.* 6685-86 (1964) (creating the 51,606.78-acre McCracken Mesa enclave of federal (public domain) mineral estate underlying tribal surface estate within the expanded Navajo Nation, which federal mineral estate is administered by the Bureau of Land Management under the Mineral Leasing Act of 1920, and which tribal surface estate is administered by the Bureau of Indian Affairs and the Navajo Nation); Pub. L. No. 80-440, 62 Stat. 72 (1948) (creating the Hill Creek Extension of the Uintah & Ouray Reservation, establishing a 726,000-acre enclave of federal (public domain) mineral estate overlain by tribal surface estate) [*see* FRED A. CONETAH, A HISTORY OF THE NORTHERN UTE PEOPLE 140-142 (Kathryn L. MacKay & Floyd A. O'Neil eds., 1982)]; *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1987 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (restoring the original boundaries of the Uintah Valley and Uncompahgre Reservations [now the Uintah & Ouray Reservation] containing numerous inholdings of private, state, and federal lands, particularly within the Uncompahgre portion of the reservation not affected by *Hagen v. Utah*, ___ U.S. ___, 114 S.Ct. 958, *reh'g denied*, ___ U.S. ___, 114 S.Ct. 1580 (1994); and Utah Code Ann. § 40-6-18 (1993) (asserting oil, gas, and mining operational jurisdiction over private, federal, and tribal lands within the State of Utah).

rights to explore for and produce oil and gas from federal, state, and fee enclaves locked within those reservations or to risk impairment of the nation's economy and security which surely will result from loss of production from those enclaves. Adding layers of governmental regulation and requiring submission to mulitiple sovereign courts increases costs. At some point, companies will find the costs of operating on or within the boundaries of Indian reservations prohibitive.

Third, the law of the circuit and district courts is in disarray, construing *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) variously. The result of these conflicting opinions is that RMOGA's members are subjected to varied procedural processes for resolving the same substantive issues. This Court needs to clarify the law.

Fourth, the majority of circuit courts have projected the law of *National Farmers* and *Iowa Mutual* far beyond what RMOGA believes was this Court's intent. *National Farmers* and *Iowa Mutual* carved-out a mere exception to federal jurisdiction under those limited circumstances when an adjudicatory proceeding is already pending in tribal court. Those cases never made absolute and universal what this Court intended to be a mere exception to federal court jurisdiction.

Fifth, RMOGA is concerned that its members, in an effort to protect their property rights on federal, state, and fee enclaves within Indian reservations, will find themselves subject to tribal jurisprudence whose statutory and common law underpinnings, particularly of

property ownership, vary widely from the Anglo-American jurisprudence under which RMOGA members acquired and hold their property rights. The problem is not one of moral or ethical superiority of one body of law over the other. Rather, it is the incongruous result of rights acquired under one concept of law, with its attendant expectations of use and enjoyment, being rendered subject to a wholly different body of law in practical enjoyment and exercise of those rights.

Sixth, RMOGA is uniquely positioned and qualified to provide the Court with a global view of the effect of the Eight Circuit's decision on oil and gas exploration, production, and transportation activities in Indian Country. RMOGA members regularly contend with the application and misapplication of the exhaustion doctrine on the numerous reservations identified. It possesses a reservoir of legal expertise gathered in addressing the issues of tribal sovereignty and interference with, and protection of, property rights stemming from non-Indian inholdings within the reservations, as well as litigating federal questions arising from its activities on the reservations. It has gathered and compiled economic and demographic data regarding the effect of multi-sovereign regulation and taxation of production from lands in, on, and surrounding Indian reservations that will be useful to the Court.

SUMMARY OF THE ARGUMENT

This case warrants review by this Court to resolve important issues regarding the relationship between federal and tribal courts. In particular, review of this case is necessary to resolve the various conflicts among the circuit courts as to the application of the exhaustion rule set forth in *National Farmers* and *Iowa Mutual*. Although *National Farmers* and *Iowa Mutual* involved efforts to avoid pending tribal court proceedings by commencing challenges to tribal court jurisdiction in federal court, the four circuit courts to have considered exhaustion have inconsistently applied the rule. Each of the four circuit courts have applied the exhaustion rule to cases not simply involving jurisdictional challenges, but rather to cases which, on their merits, involve determinations of federal law. Although cases within each circuit differ, the Eighth, Ninth and Tenth Circuits, *at times*, have required mandatory abstention in cases having an Indian reservation nexus. The Seventh Circuit, however, rejected mandatory abstention in favor of a particularized review. Review by this Court is necessary to determine the proper scope and application of the exhaustion rule.

Furthermore, a mandatory exhaustion rule, as adopted by the Eighth Circuit below, runs contrary to this Court's prior decisions. Requiring federal courts to abstain from cases having an Indian reservation nexus runs counter to the well-established case law requiring federal courts to exercise the jurisdiction granted to them by Congress. A mandatory exhaustion rule also conflicts with other precedent, not requiring abstention, where the authority of a tribe to regulate the activities of nonmembers is at issue.

Finally, in light of this Court's holding in *Iowa Mutual* that federal courts may not re-litigate issues decided by a tribal court, a mandatory exhaustion rule will, in effect, make tribal courts the final arbiter of federal law in every case having an Indian reservation nexus. This result runs counter to existing precedent under which federal courts determine the scope of a tribe's sovereign authority.

ARGUMENT

I. THE CIRCUIT COURTS ARE IN CONFLICT IN APPLYING THE EXHAUSTION RULE SET FORTH IN *NATIONAL FARMERS AND IOWA MUTUAL.*

In *National Farmers* and *Iowa Mutual*, this Court set forth an exhaustion rule preventing collateral attack in federal court of tribal court jurisdiction when there is a *pending* tribal court proceeding. The circuit courts have, however, inconsistently applied the exhaustion rule as set forth by *National Farmers* and *Iowa Mutual*. Not only are the circuit court decisions inconsistent, but decisions within the same circuit court have conflicted with each other.

In *National Farmers*, this Court faced a challenge to the jurisdiction of a tribal court. There, a Crow Indian filed suit in tribal court against a school district for personal injuries arising from an accident at a school located within the reservation but on land owned by the state of Montana. Upon the failure of the school district to respond, the plaintiff took a default judgment in the tribal court. Thereafter, the school district and its insurer filed suit in federal court, challenging the jurisdiction of the

tribal court and requesting an injunction against further proceedings in tribal court. The school district and its insurer relied on 28 U.S.C. § 1331 for federal jurisdiction.

The first issue addressed by this Court in *National Farmers* was whether the case presented a federal question since the plaintiff's personal injury claim was not based on a federal statute or on a provision of the United States Constitution. Because federal law determines the scope of a tribe's sovereignty, however, this Court held that the extent of the civil jurisdiction of a tribal court can only be answered by reference to federal law and is thus a federal question under § 1331. *Id.* at 852.

After finding the existence of a federal question, this Court required that the tribal court first be given the opportunity to determine its own jurisdiction. The holding of *National Farmers*, therefore is two-fold: (1) the issue of the scope of a tribal court's jurisdiction is a federal question; and (2) actions first brought in tribal court are not subject to jurisdictional challenges in federal court prior to the exhaustion of tribal court remedies.

Two years later, this Court considered a challenge to a tribal court's jurisdiction in federal court under the diversity statute. In *Iowa Mutual*, two Blackfeet Indians filed suit in tribal court for damages arising from a motor vehicle accident on the Blackfeet Reservation. The complaint sought not only damages for personal injuries, but damages against the insurance companies for bad faith refusal to settle. The insurance companies filed a motion in tribal court to dismiss for lack of jurisdiction. Finding that it had subject matter jurisdiction, the tribal court denied the motion.

Rather than proceeding further in tribal court, the insurers filed a federal court action seeking a declaratory judgment that they had no duty to defend or indemnify under the terms of their insurance polices. The district court dismissed the complaint for lack of subject matter jurisdiction.

This Court held that the district court did have subject matter jurisdiction. In so holding, this Court ruled that the exhaustion rule set forth in *National Farmers* does not deprive federal courts of jurisdiction. This Court went on to hold, however, that the exhaustion rule established in *National Farmers* applied equally to diversity cases, and that only the tribal court's determination of jurisdiction is subject to federal review. Unless tribal court jurisdiction is determined to be improper by a federal court, the merits of the case cannot be reconsidered.

Except for the issue of tribal court jurisdiction, neither *National Farmers* nor *Iowa Mutual* involved the interpretation or analysis of the exhaustion rule and the determination of federal questions. The circuit courts, however, are in conflict regarding whether, and how, the exhaustion rule should be applied in such cases. This is particularly important in light of the statement in *Iowa Mutual* that, once the matter is determined by a tribal court, the merits of the case cannot be reconsidered by a federal court. At one end of the spectrum are those circuit court decisions holding that exhaustion is mandatory for all cases arguably within a tribal court's jurisdiction. On the other hand, are those circuit court decisions holding that exhaustion is not mandatory, but is dependent on a particularized inquiry.

The mandatory exhaustion cases are best illustrated by decisions of the Tenth Circuit. For example, in *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991), the Tenth Circuit held that exhaustion also applies to cases in which federal courts have concurrent jurisdiction under 28 U.S.C. § 1343(a)(3). In so holding, the Court posited that *National Farmers* and *Iowa Mutual* established "an inflexible bar" to a federal district court considering the merits of a petition prior to exhaustion of tribal court remedies. *Id.* at 445. *See, also, Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992) (exhaustion appropriate in cases arising off the reservation); *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993)(when the dispute arises on the reservation, exhaustion is "an inflexible bar"; but when the dispute arises off the reservation, district courts should examine the *National Farmers* factors to determine if exhaustion is appropriate).

The Ninth Circuit in *Burlington Northern R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992), heard a challenge to a tribe's attempt to tax a railroad right-of-way running through the reservation. The court rejected the tribe's assertion that exhaustion was required:

> Burlington Northern's failure to exhaust is not a bar to jurisdiction, and the district court did not abuse its discretion by reaching the merits. The complaint presents issues of federal, not tribal law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues.

Id. at 901 n.2 (citations omitted).

A scant four months later, however, in *Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit required abstention in a challenge to a tribal ordinance regulating railroads crossing the reservation. There, the Ninth Circuit stated that exhaustion is a mandatory prerequisite to a federal court's exercise of its concurrent jurisdiction. *Id.* at 1245.

Prior to the decision below, in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), the Eighth Circuit rejected an exhaustion claim. There, an electric utility operating a nuclear power plant brought a federal court action seeking a declaratory judgment that a tribal ordinance regulating the transportation of nuclear materials was preempted by the Hazardous Materials Transportation Act ("**HMTA**"). The tribal ordinance, in part, required the transporters of nuclear material to obtain a separate tribal license for each shipment. The tribe argued that the plaintiff should first have exhausted tribal remedies. The Eighth Circuit summarily held that the HMTA preempted the tribal ordinance, thereby leaving plaintiff with nothing to exhaust. *Id.* at 463. *Accord, Public Service Company of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994).

In the case below, the court spoke of exhaustion in mandatory terms. According to the Eighth Circuit, the exhaustion rule requires that a tribal court first determine whether the subject tax and employment statutes fall within the exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994).

In contrast, the Seventh Circuit follows a particularized inquiry test. In *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), the Seventh Circuit ruled that it was necessary to first examine the factual circumstances of each case to determine whether exhaustion should apply. Finding that the dispute in *Altheimer* involved primarily issues of state and federal law, the Seventh Circuit declined to impose the exhaustion rule. *Id.* at 814.

Rule 10.1(a) of the Rules of the Supreme Court of the United States provides that conflict among circuit courts is an important factor mitigating in favor of certiorari review. The issue of whether a federal court should decline to resolve a controversy properly before it, but also within the jurisdiction of a tribal court, involves substantial policy questions. Such policy questions include the right of a litigant to a federal forum, the determination of which court should be the final arbiter of federal law, and the relationship between federal and tribal courts. Due to the inconsistent interpretations among the circuit courts and the importance of the foregoing policies, this Court should grant certiorari review.

II. THE CIRCUIT COURT DECISIONS APPLYING A MANDATORY EXHAUSTION RULE CONFLICT WITH THIS COURT'S DECISIONS HOLDING THAT FEDERAL COURTS SHOULD EXERCISE THEIR JURISDICTION.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), this Court discussed the strict limitations of the abstention doctrine:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. . . . "

See, also, New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989)("only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States"). Requiring mandatory abstention when there is no pending tribal court proceeding runs counter to the "unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

This Court has not required exhaustion in any decision addressing the authority of a tribe to regulate the activities of non-members. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the issue was the authority of a tribe to impose a zoning ordinance over fee lands owned by non-Indians but located within reservation boundaries. Similarly, in *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993), this Court faced the issue of whether a tribe could prohibit hunting by non-Indians on non-trust land located within the reservation. Resolution of the merits in both *Brendale* and *Bourland* involved interpretation of federal law. Moreover, this Court decided both *Brendale* and *Bourland* long after *Iowa Mutual*. Yet this Court did not require abstention in either case. In considering *Bourland* on remand, the Eighth Circuit suggested that issues

involving attempted tribal regulation of activities in private enclaves within the exterior boundaries of reservations should be heard in federal court. *South Dakota v. Bourland,* 1994 WL 605890, *2 (8th Cir. Nov. 7, 1994).

Abstention in cases involving the interpretation of federal law going to the merits of a controversy is not appropriate in light of this Court's statement in *Iowa Mutual* that, after abstention in favor of a tribal court, federal courts may not reconsider the merits. This, in effect, makes tribal courts the final arbiter of federal law in every case having an Indian reservation nexus. In requiring mandatory abstention in this case, the Eighth Circuit assumed that federal courts could later reconsider the conclusions of the tribal court as to whether the subject tax and employment statutes were appropriate under *Montana v. United States,* 450 U.S. 544 (1981):

> [W]e note that the Tribe may have a heavy burden justifying these tax and employment statutes under the *Montana* exceptions but that caveat does not alter our conclusion that this issue is for the Tribal Court to determine *in the first instance.*

Duncan Energy, 27 F.3d at 1301 (emphasis added). This assumption is of dubious validity in light of this Court's earlier statement in *Iowa Mutual* that federal courts cannot rehear the merits if it is determined that the case was properly within the tribal court's jurisdiction.

CONCLUSION

For these reasons, RMOGA respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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